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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

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30 In re FACEBOOK BIOMETRIC) Master File No. 3:15-cv-03747-JD
31 INFORMATION PRIVACY LITIGATION)
32 _____)
33 This Document Relates To:)
34 ALL ACTIONS.)
35 _____)
36 FREDERICK W. GULLEN, Individually and)
37 on Behalf of All Others Similarly Situated,)
38)
39 Plaintiff,)
40 _____)
41 vs.)
42 _____)
43 FACEBOOK, INC.,)
44)
45 Defendant.)
46 _____)
47
48

1 **I. INTRODUCTION**

2 Pursuant to Rules 16 and 56 of the Federal Rules of Civil Procedure, Civil Local Rule 7-11
 3 and this Court's Standing Order for Civil Cases, Plaintiffs¹ hereby move to summarily deny or
 4 continue Defendant Facebook, Inc.'s ("Facebook") December 8, 2017 Motion for Summary
 5 Judgment Based on Illinois' Extraterritoriality Doctrine and the Dormant Commerce Clause (ECF
 6 No. 257) ("Facebook's Motion"). Facebook's Motion is premature and in violation of the Court's
 7 September 11, 2017 Amended Scheduling Order (ECF No. 223) ("Amended Scheduling Order"), as
 8 it relies directly and substantially on highly technical evidence concerning the inner-workings of
 9 Facebook's facial recognition process that will be the subject of forthcoming expert discovery, and
 10 yet Facebook filed its motion before such expert discovery has even begun and more than three
 11 months before the date designated for the filing of summary judgment. *Id.* Facebook's Motion is
 12 also futile as it appears to seek relief on the basis of an affirmative defense that it has not pleaded
 13 and therefore waived. Accordingly, and as detailed below, Facebook's Motion should be summarily
 14 denied or continued until after the close of expert discovery, such that the Court and parties can
 15 address all summary judgment grounds at once on a complete evidentiary record.²

16 **II. ARGUMENT**

17 **A. Plaintiffs' Response to Facebook's Motion Requires the Completion of
 18 Expert Analysis Contemplated by the September 11, 2017 Amended
 Scheduling Order**

19 Facebook's Motion rests on complex disputed facts requiring expert discovery that has not
 20 even begun. Despite the Court's clear Amended Scheduling Order and admonitions against chaotic
 21 summary judgment proceedings, on December 8, 2017, Facebook's Motion leapfrogged expert
 22 discovery, seeking judgment on issues that are clearly the subject of expert analysis and opinion.
 23 Indeed, Facebook's Motion purports to assert undisputed facts regarding the very subjects on which
 24 experts are expected to opine. *See, e.g.*, Facebook's Motion at 4-5 (raising disputed facts concerning

25 _____
 26 ¹ "Plaintiffs" refers to Nimesh Patel, Adam Pezen, Carlo Licata and Frederick William Gullen.

27 ² Here, Plaintiffs address the plain procedural impropriety of Facebook's Motion. In due course,
 28 Plaintiffs will make a full showing under Rule 56(d) and, if need be, address the many substantive
 deficiencies in Facebook's premature motion.

1 the processes of face detection, alignment and classification as component parts of facial recognition
 2 and collection of biometric data from photos). *Cf.* Standing Order For Civil Cases Before Judge
 3 James Donato, at ¶21 (“Summary judgment motions that involve disputed material facts will usually
 4 be denied promptly in a short order.”). These purported factual conclusions about the performance
 5 of Facebook’s facial recognition technology are based on the declarations of Omry Yadan and
 6 deposition testimony of Yaniv Taigman that is the subject of expert analysis. *See* Facebook’s
 7 Motion at 10. The parties’ experts still have yet to serve expert reports pursuant to Rule 26 of the
 8 Federal Rules of Civil Procedure, and no expert depositions have been taken. In other words, if
 9 Facebook’s Motion is allowed to proceed at this time, both sides’ experts will still be submitting
 10 reports and testifying about precisely the same technical issues that underlie Facebook’s present
 11 motion ***long after that motion has been fully briefed.*** That is palpably unworkable. Until Plaintiffs
 12 are afforded an opportunity for full expert discovery, summary judgment is plainly unwarranted
 13 under Rule 56(d). *See Burlington N. Santa Fe R.R. Co. v. Assiniboine & Sioux Tribes of Fort Peck*
 14 *Reservation*, 323 F.3d 767, 773-74 (9th Cir. 2003) (“the Supreme Court has restated the rule as
 15 requiring, rather than merely permitting, discovery ‘where the non-moving party has not had the
 16 opportunity to discover information that is essential to its opposition’”; thus, where summary
 17 judgment is filed “early” a “‘continuance . . . for purposes of discovery should be granted almost as a
 18 matter of course’”) (citations omitted).

19 **B. Facebook’s Motion Is Wildly Premature and in Direct Contravention
 20 of the September 11, 2017 Amended Scheduling Order**

21 On August 31, 2017, the parties filed their respective and competing proposals for the
 22 scheduling of the remainder of the litigation. *See* Joint Case Management Statement (ECF No. 218)
 23 (“Joint Statement”). Defendant Facebook advocated sequencing summary judgment after class
 24 certification and expert discovery. *See* Joint Statement at 3 (“expert discovery should be completed
 25 before [summary judgment] motions are filed”). On September 7, 2017, the Court held a case
 26 management conference, during which it made clear to the parties that the Court would not consider
 27 summary judgment motions before expert discovery:
 28

Court: There's going to be close of fact discovery. There's going to be close of expert discovery. ***Then you're going to do all of your motions after that. . . .*** Otherwise, it's too chaotic.³

On September 11, 2017, the Court entered the Amended Scheduling Order reflecting the same and setting the date of March 16, 2018 for summary judgment motions:

5 Expert Disclosures: December 22, 2017

6 Rebuttal Expert Disclosures: February 2, 2018

7 ||| Close of Expert Discovery: March 2, 2018

8 Dispositive and *Daubert* motions: March 16, 2018

9 || Amended Scheduling Order.⁴

10 Not only is Facebook'

11 without notice to Plaintiffs, without meet and confer and makes no attempt to show the good cause
12 necessary to amend the Amended Scheduling Order under Rule 16. *See Johnson v. Mammoth*
13 *Recreations, Inc.*, 975 F.2d 604 (9th Cir. 1992). Nor could it. The Court already considered and
14 rejected the prospect of summary judgment motions before expert discovery. Sept. 7 Transcript at
15 19:17-21. Facebook also boldly asserts that it will file yet *another* summary judgment motion at the
16 close of expert discovery (Facebook’s Motion at 1) exactly the “chaotic” approach to summary
17 judgment the Court admonished the parties it would not do.

C. Facebook’s Motion Is Grounded in an Affirmative Defense It Did Not Plead and Therefore Waived

Facebook’s Motion is also futile. Its primary ground is extraterritoriality – an affirmative defense which its Amended Answer, filed nearly one year ago, did not plead. *See generally*

²² ³ Sept. 7, 2017 Transcript of Proceedings at 19:17-21 (ECF No. 222) (“Sept. 7 Transcript”) (emphasis added).

23 ⁴ See also Facebook’s September 22, 2017 Administrative Motion to Amend the Scheduling Order
24 (ECF No. 224) at 1 (Facebook reiterating position that “dispositive motions be set . . . after the
25 completion of expert discovery” and that ““expert discovery should be completed before”” any such
26 “motions is filed” because to allow summary judgment before expert discovery would be ““both
27 unfair and unworkable”” and ““would effectively prevent the parties from filing *Daubert* motions in
28 connection with either seeking or opposing . . . summary judgment . . . which would almost certainly
rely on expert opinion testimony””); Facebook’s September 27, 2017 Reply in Support of its
Administrative Motion to Amend Scheduling Order (ECF No. 226) at 1 (Facebook reiterating its
position that ““expert discovery should be completed before . . . summary judgment[] motions are
filed””).

1 Defendant Facebook, Inc.'s Amended Answer and Affirmative Defenses to Plaintiffs' Complaint
 2 (ECF No. 169) ("Amended Answer"). Facebook's Motion argues that even "[i]f Facebook's use of
 3 facial-recognition technology *did* violate BIPA, that alleged violation took place *outside* Illinois."
 4 Facebook's Motion at 1 (some emphasis in original); *H.R.R. Zimmerman Co. v. Tecumseh Prods. Co.*, No. 99 C 5437, 2002 U.S. Dist. LEXIS 16911 (N.D. Ill. Sept. 5, 2002) (extraterritoriality under
 5 Illinois law is an affirmative defense). Because Facebook has failed to plead this affirmative defense
 6 in its Amended Answer, it is waived. *See, e.g., Morrison v. Mahoney*, 399 F.3d 1042, 1046 (9th Cir.
 7 2005) (a party "is required to raise every defense in its first responsive pleading, and defenses not so
 8 raised are deemed waived") (citing Fed. R. Civ. P. 8(c), 12(b), 12(g)). This fact is undisputed and
 9 summary denial is warranted.

10 **III. CONCLUSION**

11 Because Facebook's Motion violates the Amended Scheduling Order, fails to seek
 12 amendment of the same and seeks relief on an affirmative defense it did not plead, Plaintiffs
 13 respectfully request that Facebook's Motion be summarily denied or continued until expert
 14 discovery is complete.

15 DATED: December 13, 2017

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on December 13, 2017, I authorized the electronic filing of the foregoing
3 with the Clerk of the Court using the CM/ECF system which will send notification of such filing to
4 the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I
5 caused to be mailed the foregoing document or paper via the United States Postal Service to the non-
6 CM/ECF participants indicated on the attached Manual Notice List.

7 I certify under penalty of perjury under the laws of the United States of America that the
8 foregoing is true and correct. Executed on December 13, 2017.

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